

## INDEX

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	Page
MOTION TO DISMISS OR AFFIRM .....	1
STATEMENT OF THE CASE .....	2
NO SUBSTANTIAL QUESTION IS PRESENTED .....	4
A. The rulings were clearly correct and the law is settled .....	4
B. Criminal statutes are in force and should be used to penalize violators of postal laws .....	7
C. Postal blocks are prohibited .....	13
D. Use of the mails is a right and not a privilege subject to arbitrary denial by postal authorities .....	16
E. Erection of a mail block is censorship, and censoring may only be done by incorporating certain procedural safeguards .....	19
F. Section 4007 as written is a denial of equal protection of the laws as applied to First Amendment freedoms .....	25
G. Sections 4006 and 4007 constitute an invalid prior restraint and create a chilling effect upon first amendment freedoms .....	33
CONCLUSION .....	41

## TABLE OF CITATIONS

*Cases*

	Page
Adams v. Hinkle, 322 P 2d 844 .....	31
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 .....	8, 34
Bond v. Moore, 93 U.S. 593 .....	4
Boyd v. U.S., 116 U.S. 635 .....	25
Burns v. Ohio, 360 U.S. 252 .....	28
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 .....	8, 37
Cox v. Louisiana, 379 U.S. 559 .....	26
Eichel v. U.S. Fidelity and Guarantee, 245 U.S. 102 .....	4
Freedman v. Maryland, 380 U.S. 51 .....	8, 9, 19, 35
Ginsberg v. New York, 390 U.S. 629 .....	42
Griffin v. Illinois, 351 U.S. 12 .....	28
Hannegan v. Esquire, Inc., 327 U.S. 146 .....	13, 15
Hiett v. U.S., 415 F. 2d 664 .....	17
Jacobellis v. Ohio, 378 U.S. 184 .....	11
Alan Kalker v. Lim P. Lee, USDC, Northern District of California, No. 51488 .....	24
Katzev v. County of Los Angeles, 341 P 2d 310 .....	30
Kingsley Int'l. Pictures Corp. v. Regents, 360 U.S. 684 .....	11
Lamont v. Postmaster General, 381 U.S. 301 .....	4, 6, 16, 21, 25, 38
Manual Enterprises v. Day, 370 U.S. 478 .....	12, 14, 38, 39
Marcus v. Search Warrant, 367 U.S. 717 (1961) .....	36, 38
Martin v. Struthers, 319 U.S. 141 .....	14
McLaughlin v. Florida, 379 U.S. 184 .....	26
Milwaukee Pub. Co. v. Burleson, 255 U.S. 407 .....	14
Morey v. Doud, 354 U.S. 457 .....	29
Near v. Minnesota, 283 U.S. 697 .....	34
Niemotko v. Maryland, 340 U.S. 268 .....	27

	Page
Pennsylvania Co. v. Donat, 239 U.S. 50 .....	4, 6
People v. Richmond County News, 175 N.E. 2d 681 (1962) .....	10
Pike v. Walker, 121 F. 2d 37 (D.C. Ct. App.) .....	16
Police Commissioner of Baltimore City v. Siegel Enterprises, 162 A 2d 727 (1960) .....	29
Roth v. U.S., 354 U.S. 476 .....	10
Speiser v. Randall, 357 U.S. 513 .....	34, 35
U.S.A. v. A Motion Picture Entitled, "I Am Curious-Yellow", 404 F. 2d 196 (1968) .....	12
U.S. v. One Obscene Book Entitled Married Love, 48 F. 2d 821 (1931) .....	12
United States v. 4,400 Copies of Magazines, etc., 276 F. Supp. 902 (1967) .....	12
Yick Wo v. Hopkins, 30 L ed. 220 .....	31
Zeitlin v. Arnenberg, 383 P. 2d 152 (1963) .....	10

### *Constitution and Statutes*

United States Constitution, First Amendment .....	2, 3, 5, 6, 7, 8, 9, 10, 14, 19, 21, 22, 25, 26, 27, 29, 31, 32, 33, 34, 37, 41, 42
United States Constitution, Fifth Amendment .....	26, 38
United States Constitution, Fourteenth Amendment .....	25
18 U.S.C. 1461 .....	7, 9, 38, 39
39 U.S.C. 4006 .....	2, 3, 4, 5, 6, 8, 21, 32, 33, 34, 39, 40, 41, 42
39 U.S.C. 4007 .....	2, 3, 5, 6, 9, 10, 21, 25, 26, 29, 32, 33, 34, 39, 40, 41, 42

### *Miscellaneous*

39 C.F.R. Section 262 .....	24
39 C.F.R. Sections 921.1 <i>et seq.</i> .....	8
39 C.F.R. Section 952.7 .....	8
39 C.F.R. Section 952.24 .....	8

39 C.F.R. Section 952.25 .....	17001 20191002
39 C.F.R. Section 952.27 .....	
Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 115 (1960) .....	1

IN THE  
**Supreme Court of the United States**

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October Term, 1969

Nos. 788 and 812

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**UNITED STATES OF AMERICA and the  
POSTMASTER GENERAL,**  
*Appellants,*

v.

**THE BOOK BIN,**  
*Appellee.*

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On Appeal from the United States District Court  
for the Northern District of Georgia

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**MOTION TO DISMISS OR AFFIRM**

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Appellee, in the above entitled case, moves this Honorable Court to dismiss the appeal herein on the grounds hereinafter set forth, or in the alternative to affirm the judgment sought to be reviewed on the appeal upon the grounds that it is

manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

### Statement of the Case.

The Appellee is engaged inter alia in the sale, distribution and offering for sale and distribution of nudist magazines, and male and female nude photo art publications, books and other presumptively protected *First Amendment* materials. This distribution is conducted from its premises at 267 Marietta Street, N.W., Atlanta, Georgia, 30313. During the course of its dissemination of these materials the Appellee has utilized the services of the United States Post Office by mailing publications, communications and other materials. The Appellee is also the recipient of large amounts of correspondence, requests for publications, and remunerations similarly delivered through the services of the United States Post Office.

The Appellant initially subjected the Appellee to the administrative procedures pursuant to 39 U.S.C. 4006 based upon the allegation that a certain magazine, i.e., "Models de France" was deemed obscene by the postal authorities and that this purportedly obscene magazine was being sent through the United States mails.

The Appellant then proceeded to invoke the procedures of 39 U.S.C. 4007 seeking a Temporary Restraining Order and a Preliminary Injunction for the detention of all Appellee's incoming mail during the pendency of the administrative proceedings. The Appellant averred the need for the order was to preserve the *status quo* and to permit effective enforcement under the correlative administrative proceedings. Willingness on the part of the government was stated, that the

Appellee be entitled to the opening of the detained mail and subsequent examination and then to have delivery if such mail is clearly not connected with the purportedly unlawful activity.

Under 39 U.S.C. 4006, the Postmaster General is given the right to stamp "unlawful" upon mail addressed to the Appellee and return it to the sender if he finds the statutory criteria is met upon "evidence satisfactory to (him)".

Upon completion of all the statutory proceedings, the burden of seeking judicial review falls upon the party against whom an order to deny the delivery of mail was issued. The burden of proof then shifts to the party seeking the aid of the court to show that the administrative order is improper.

Under both the administrative procedure and the judicial procedure in aid of the 4006 enforcement, any denial of receipt of mail or delivery thereof, by necessity, also prohibits the receipt of mail items unconnected with the purportedly obscene materials involved in the controversy without the affirmative duty upon the intended recipient to seek the opening of and the examination of the materials and the showing to the postal authorities that the materials are clearly unconnected with the allegedly unlawful activity.

The Appellant, in application to the United States District Court, merely has the duty of showing "probable cause" in order to obtain the temporary detention of Appellee's incoming mail "pending the conclusion of the statutory proceedings and any appeal therefrom." Should the District Court not find even the minimal requirement of probable cause involving Appellee's *First Amendment* rights, sufficient to deny the delivery of mail, it does not in any way prohibit the continuation of the administrative proceedings since 4007

provides that the grant or denial of the detention order "does not affect or determine any fact at issue in the statutory proceedings."

### No Substantial Question is Presented.

#### A. The rulings were clearly correct and the law is settled.

United States District Courts from two circuits have been presented with the question of the constitutionality of 39 U.S.C. 4006. Each of these Courts were constituted under the statutory scheme providing for a Three Judge Court. Each of the panels came to the same unanimous conclusion that 39 U.S.C. 4006 was unconstitutional upon its face in independent proceedings. Both the Courts came to the same conclusion upon questions of fact and questions of law. The United States of America and the Postmaster General have elected to appeal these unanimous decisions.

This Court can affirm the decisions rendered below without further review whenever the rulings are found to be clearly correct, *Eichel v. U.S. Fidelity and Guarantee Co.*, 242 U.S. 102.

This Court can affirm a lower court judgment where the rulings are correct upon the record and pleadings. This is true although the grounds for the decision on appeal may be different, *Bond v. Moore*, 93 U.S. 593.

This Court has previously settled the law, in cases of this kind, and has prohibited Postal authorities from erecting postal blocks, *Lamont v. Postmaster General*, 381 U.S. 301, and hence the Court can affirm the judgments of the lower courts as the appeal is frivolous, *Pennsylvania Co. v. Donat*, 239 U.S. 50.

In both cases presently on appeal, the Postal authorities contend the statute reflects a proper legislative purpose, i.e., curbing the commercial exploitation of pornographic matter through the mails. It is also contended that the procedure is analogous to that employed in the prevention of frauds and lotteries in using the mails. Yet neither of those crimes are present in the dissemination of presumptively protected *First Amendment* materials.

The United States District Court herein had before it the additional question of the constitutionality of 39 U.S.C. 4007. The Appellee on or about June 10, 1969, was served with a complaint under 39 U.S.C. 4006 charging that the magazine "Models de France" was obscene and was being distributed by the Appellee. A hearing was set forth and subsequently postponed. On June 13, 1969, the Appellant notified the Appellee that a temporary restraining order and preliminary injunction would be sought under 39 U.S.C. 4007 in the United States District Court. Under 4007, the court was granted the authority to issue such orders upon the showing of "probable cause," and direct the detention of all of the Appellee's incoming mail from the date of issuance of the order until the conclusion of the statutory administrative proceedings and any appeal therefrom. It would then effectively set up a mail block of all incoming mail irrespective of the content and irrespective of the similarity to the purportedly obscene magazine. To that extent mail of a religious nature as well as mail from any and all sources would be impounded. It would then become the duty of the intended recipient to secure the opening and examination of the incoming mail and show the mail was clearly not connected with the alleged unlawful activity before it would be released and delivered. On June 12, 1969, a complaint was filed in the United States District Court for the Northern District of Georgia by the United States of America and the

Postmaster General seeking the mail block against The Book Bin. An attack was subsequently made upon the constitutionality of 39 U.S.C. 4007 by Appellee and requested the convening of a Three Judge Court. This request was in conjunction with the attack on 4006, *supra*. The District Court found that Section 4007 complements Section 4006 and the two sections had to be interpreted together. This decision is correct in that the actual mail block order is set up following the institution of the administrative proceedings and in supplement thereof.

As stated before, this Court can affirm the lower court's decision without further review whenever the rulings are found to be clearly correct. Additionally, this Court can affirm a lower court decision when the law in this area is settled as it has been in *Lamont v. Postmaster General*, *supra*, and hence the Court can affirm the judgments of the lower court as the appeal is frivolous, *Pennsylvania Co. v. Donat*, *supra*.

Suffice it to say that should a mail block be imposed merely upon the showing of "probable cause" it would extend until the matter is heard and determined in the administrative proceedings. If an adverse ruling is received all the administrative appeals must be exhausted before reaching the courts. And even when it is ripe for determination in the courts the burden is upon the moving party to affirmatively convince a court that the administrative finding was erroneous. Such proceedings and appeals are costly in time irrespective of monetary value. And in the interim the mail recipient is ostracized from the flow of mail. Such a burden upon the sending and receipt of presumptively protected materials is repugnant to the freedoms secured to Appellee under the *First Amendment* to the *Constitution of the United States*.

B. Criminal statutes are in force and should be used to penalize violators of postal laws.

While obscenity is subject to regulation and proscription, the statute of necessity must conform to those procedures that do not inhibit the free exercise of speech and press that are protected. These enactments do not protect these freedoms but engulf them in an all encompassing statute, the good and the bad.

Congress has seen fit to regulate obscenity in the mails, 18 U.S.C. 1461, and has provided criminal penalties for engaging in such conduct. Appellant contends that the statutes herein reflect an intention of Congress to curb the commercial exploitation through the mails of pornographic matter. Congress, however, has already provided a criminal penalty for such violations. A criminal statute, however, requires the burden of proof to be beyond a reasonable doubt, and it of necessity must follow an adversary hearing with the burden of persuasion upon the enforcement officials. The converse is true under these statutes. Postal authorities need only institute the necessary administrative proceedings within the Post Office Department to be in the position of seeking and obtaining a mail block. In enforcing the mail block aided by an injunction order, they need only show "probable cause." There is no judicial finding of obscenity of the particular material. Additionally, a completely effective mail block is imposed with no resultant distribution. The recipient then must of necessity take certain actions in order to receive any mail and then only when it is shown that the mail matter is clearly unconnected with the allegedly obscene material.

The Postal authorities, in proceeding under these statutes, are engaging in the practice of censorship of *First Amendment*

freedoms which have been variously condemned by the courts including this Court, *Freedman v. Maryland*, 380 U.S. 51. There can be no other purpose in condemning a particular publication and seeking such a sweeping, all encompassing order. The mere fact that a United States District Court does not find "probable cause" and refused to enter an order does not remove the threat in any degree. For this in no way prevents the Postmaster General from finding a violation of Section 4006, and subsequently imposing the restrictions permitted under that section, all of which may occur without any prior judicial hearing on obscenity. This could not occur if the Postal authorities were required to proceed under the criminal statute presently in force.

While "prior restraints" are not in and of themselves invalid, any prior restraint of *First Amendment* rights bears a heavy presumption of invalidity, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175.

Procedurally we have built-in delay. The administrative procedures established by regulation under Section 4006, see 39 C.F.R. Sections 952.1, et seq., do not provide the minimal procedural safeguards enunciated by this Court in *Freedman*, supra. The procedures provide that a hearing must be provided, "(w)henever practicable. . . within 30 days of the date of the notice" of the hearing, 39 C.F.R. Section 952.7. In the matter presently before this Court a hearing was set four weeks after service of the complaint against Appellee, which later was postponed. Following a hearing the Postal Examiner is required to issue his findings with "all due speed," 39 C.F.R. Section 952.24. In the event the hearing examiner's decision is adverse, an appeal must be taken to exhaust all administrative remedies. This appeal must be taken within 15 days of the examiner's decision, 39 C.F.R. Section

952.25. On appeal there is no limitation on when the decision must be given. Moreover, 39 C.F.R. Section 952.27 permits an Appellant under the postal laws to file a motion for reconsideration of the final departmental decision. In the interim all of the Appellee's incoming mail may be detained under an order, if obtained under Section 4007, merely upon the showing of "probable cause." At this point the mail recipient must then apply to the courts for any relief that may be forthcoming, with the burden upon him to show that the administrative decision was erroneous. Needless to say the Court in *Freedman v. Maryland*, *supra*, did not envision such a protracted delay in the vindication of *First Amendment* rights.

Appellant makes a distinction between a board created for the express purpose of censoring versus the Post Office Department that was not created for such a purpose. Logic and facts in the case at bar will show that irrespective of the motivation creating an agency, the agency may embark upon the duties of a censor. This is amply shown in the case at bar. Were it not for the Postal authorities embarking upon the course of attempting to set up a mail block based upon the alleged obscenity of a named publication this matter would not now be before this Court. These same authorities had another route of procedure in instituting criminal sanctions under 18 U.S.C. 1461 which would have provided a prompt judicial determination of the violation in the atmosphere of an adversary hearing. These same authorities decided to forego such a hearing and proceed in the manner of a censor and attempt to set up a complete mail block. In this manner the Postal authorities may in and of themselves determine what is proscribable and inhibit if not prevent the recipient's use of the mails, irrespective whether the recipient has ever been convicted of a crime.

The Appellee, in the case before this Court, would have only been able to get full judicial review on the question of obscenity, by which the Postmaster would actually be bound, after the lengthy administrative proceedings and then by his own initiative. During the course of those proceedings the threat, of prolonged duration, of an adverse administrative decision or in combination with a sweeping order under *Section 4007*, would have a severe "chilling effect" upon the exercise of Appellee's *First Amendment* rights. All of this may occur without a final judicial determination of obscenity.

The determination of whether particular materials are constitutionally protected is a legal question of the utmost importance to be determined by a court, not a question of fact to be determined by a judicial hearing officer of the Post Office Department. This Court in *Roth v. U.S.*, 354 U.S. 476 stated:

"...the question of whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive kind."

The New York Court of Appeals in *People v. Richmond County News*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 360, 175 N.E. 2d 681 (1962) stated:

"...if an Appellate Court were to rely upon and be bound by the opinion of the trier of facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues."

The Supreme Court of the State of California in *Zeitlin v. Arnenberg*, 59 C. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152 (1963) stated:

"...they raise issues, not of ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; *the court itself must determine the law of the case* for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene." (59 C. 2d at P. 908, 909. (Emphasis supplied).

The opinion of this Court in *Jacobellis v. Ohio*, 378 U.S. 184 in discussing the issue of fact versus law judgment stated:

"...we are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence'. The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

*Kingsley Int'l. Pictures Corp. v. Regents*, 360 U.S. 684, 708, 3 L ed 2d 1512, 1527, 79 S Ct 1362 (separate opinion):

"It is sometimes said that this Court should shun considering the particularities of individual cases in this difficult field lest the Court become a final board

of censorship. But I cannot understand why it should be thought that the process of constitutional judgment in this realm somehow stands apart from that involved in other fields, particularly those presenting questions of due process..."

*Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 115 (1960):*

"This obligation—to reach an independent judgment in applying constitutional standards and criteria to constitutional issues that may be cast by lower courts in the form of determinations of fact—appears fully applicable to findings of obscenity by juries, trial courts, and administrative agencies. The Supreme Court is subject to that obligation, as is every court before which the constitutional issue is raised."

*U.S. v. One Obscene Book Entitled Married Love, 48 F. 2d 821 (1931):*

"...this court must determine, as a matter of law in the first instance, whether the book alleged to be obscene falls in any sense within the definition of that word."

*U.S.A. v. A Motion Picture Film Entitled, "I Am Curious Yellow," 404 F. 2d 196 (1968):*

"However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the Court..."

See also: *Manual Enterprises v. Day, 370 U.S. 478, 8 L ed 2d 639 at page 647. United States v. 4,400 Copies of Magazines, etc. 276 F. Supp. 902 (1967).*

### C. Postal Blocks Are Prohibited.

Postal blocks are clearly repugnant to the *Constitution of the United States*. This Court has settled the law that postal blocks are unconstitutional by placing a duty upon the restricted recipient to act in order to enjoy the free use of mail distribution. The power of censorship has never been given to the Postmaster General. This Court in *Hannegan v. Esquire, Inc.*, 327 U.S. 146 stated the following of the censorship power undertaken there by the Postmaster General:

"An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes 'information of a public character' or is devoted to 'literature' or to the 'arts.' It is whether the contents are 'good' or 'bad.' To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred. (Emphasis supplied)

...

"We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publications entitled to that classification have indeed varied through the years. And the Court held in *ex parte Jackson*, 96 U.S. 727, 24 L ed 877, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.

...

"What seems to one to be trash may have for others fleeting or even enduring values.

...

"But the power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare."

And in *Martin v. Struthers*, 319 U.S. 141, this Court dealt with a municipal ordinance forbidding the door to door dissemination of pamphlets and periodicals. It was stated:

"The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder."

How different is it that the judgment of the recipient and disseminator of *First Amendment* materials is substituted in the case at bar for the judgment of the Postmaster General and other postal authorities.

And again as stated as early as 1921 in the case styled *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, in Justice Holmes' dissenting opinion, at page 437:

"The United States may give up the Post Office when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."

This Court had before it another case involving obscene mail matter in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. The Court struck down the lower court ruling but could not

agree upon a single opinion. However, Mr. Justice Brennan and two other members of the Court in a separate opinion stated:

"We have sustained the criminal sanctions of Sec. 1461 against a challenge of unconstitutionality under the *First Amendment*. *Roth v. United States*, 354 U.S. 476, 1 L ed 2d 1498, 77 S Ct 1304. We have emphasized, however, that the necessity for safeguarding *First Amendment* protections for nonobscene materials means that Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity...without regard to the possible consequences for constitutionally protected speech.' *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731, 6 L ed 2d 1127, 1136, 81 S Ct 1708. I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts."

Mr. Justice Brennan then cited with approval a quote from one of the Court's prior decisions entitled *Hannegan v. Esquire*, *supra*:

"The provisions...would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country. *Hannegan v. Esquire, Inc.* 327 U.S. at 156, 90 L ed 586, 66 S Ct 456. I, therefore, concur in the judgment of reversal."

- D. Use of the mails is a right and not a privilege subject to arbitrary denial by postal authorities.

The Court in *Lamont v. Postmaster General*, 381 U.S. 301 quoted with approval an excerpt from the United States Court of Appeals in the matter styled *Pike v. Walker*, 121 F. 2d. 37 (D.C. Ct. App.). Judge Groner in rendering the court's opinion involving use of the mails in a scheme of fraud had before him the proposition that the individual has no natural or constitutional right to have his communications delivered by the postal establishment of the government. It was stated there:

"It may be safely stated, therefore, that no one can claim the right to use the mail for the transmission of matter which Congress has properly declared to be non-mailable, but we think it is equally clear, and is so stated in the *Coyne* case, that even Congress is without power to extend the benefits of the postal service to one class of persons and deny them to another of the same class. As was said in *Burton v. United States*, the authority of the Post Office Department in the protection of the mail, 'has its sanction in the power of the United States, by legislation, to designate what may be carried in the mails and what must be excluded therefrom; such designation and exclusion to be, however, consistent with the rights of the people as reserved by the Constitution.'

"Precisely this view was expressed by Mr. Justice Brandeis in his dissenting opinion in *United States ex rel Milwaukee Publishing Co. v. Burleson* in which he said the power of Congress over the postal system, 'like all its other powers, is subject to the limitation of the Bill of Rights'; and by Mr. Justice Holmes in his dissenting opinion in *Leach v. Carlile*, wherein he expressed the same thought in these words: 'But

when habit and law combine to exclude every other (means of transportation of mail) it seems to me that the *First Amendment* in terms forbids such control of the post as was exercised here.'

"Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution. . ."

The United States Court of Appeals for the Fifth Circuit in the matter entitled *Hiatt v. U.S.*, 415 F. 2d. 664, reversed the United States District Court for the Western District of Texas wherein the Appellant there was convicted of using the mails to solicit business in procuring foreign divorces. The Court there reviewed the history of power granted to the postal authorities in regulating the use of the mails. It then stated the restrictions upon the use of such power together with the rejection of the proposition that the use of the mails was a privilege and could be denied or restricted at the option of the postal authorities. The court stated:

"However, it is one thing to say, as the cases hold, that a power of Congress may legitimately be used to protect the public health, safety, welfare, or morals, and quite a different thing to say, as appellee apparently says, that its use of police power purposes automatically overrides the specific limitations on

Congressional power that are contained in the Bill of Rights. Admittedly, the freedom of speech is not absolute; but neither may the powers of Congress, even though delegated by the Constitution, be regarded as absolute, since they would obliterate the first amendment if asserted to their logical extreme. Thus both the commerce power and the tax power have been held to be circumscribed by the first amendment. See *Red Lion Broadcasting Co. v. FCC*, 1969, 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371; *Murdock v. Pennsylvania*, 1943, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1291. Similarly, regulation of speech through the postal power, although it is authorized where necessary to effect legitimate legislative ends, is to be tested against the first amendment.

...

"We find that the trend of cases, and especially the more recent decisions of the Supreme Court, has given the privilege doctrine the burial it merits. The need for Congress to respect the provisions of the Bill of Rights in the exercise of the postal power has long been emphasized.

...

"The now-famous Holmes dissent in *Milwaukee Social Democratic Pub. Co.* states that '(t)he United States may give up the post office when it sees fit, but while it carries it on the use of mails is almost as much a part of free speech as the right to use our tongues.' In another dissent, in the Roth case, Mr. Justice Harlan wrote: 'The hoary dogma of *Ex parte Jackson*\*\*\* and *Public Clearing House v. Coyne*\*\*\* that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, has long since evaporated.' In Roth, if not in Milwaukee, the majority clearly agreed, because it discussed at length the question whether obscene materials sent through the mail constituted protected

speech, an inquiry that would have been meaningless had the Court subscribed to the privilege doctrine."

- E. Erection of a mail block is censorship, and censoring may only be done by incorporating certain procedural safeguards.

Those restrictions, in the form of a mail block, upon freedom of speech and press are not permissible without the burden being placed upon the censor to seek final judicial determination within a brief specified period of time. Such burdens are not incorporated within the postal statutes at issue. This Court has previously held that such all encompassing censorship laws are repugnant to the *First Amendment* to the *Constitution of the United States*. This Court had a similar proposition before it in *Freedman v. Maryland*, 380 U.S. 51. That matter involved censorship of Motion Picture films permitted under a Maryland statutory scheme. Even though the matter there was based upon a censorship and licensing statute the analogy is present in that it involved an attempt to censor and prevent the dissemination of *First Amendment* materials. This Court held that the Maryland statutory scheme was repugnant to the freedoms guaranteed to the citizens by virtue of the *First Amendment*. The Court stated much of the criteria necessary to be procedurally incorporated before the infirmity would be removed.

"In substance his argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

"Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court — part of an independent branch of government — to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

"Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in *Speiser v. Randall*, 357 U.S. 513, 526, 2 L. ed. 2d 1460, 1473, 78 S. Ct. 1332, "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination is an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."

This Court then held that the censor must institute the judicial proceedings and then have the burden of persuasion before the court.

In this context we must look at the statutory scheme under which the Postmaster General is proceeding. First and

foremost there is no adversary proceeding bearing upon the issue of obscenity prior to the administrative hearing or the complaint seeking a Temporary Restraining Order and Temporary Injunction. After the initial determination by the hearing officer all administrative appeals must be undertaken by the mail recipient. His incoming mail may be detained during the interim only upon an *ex parte* showing of "probable cause." An adverse ruling would necessitate the recipient to institute review in the courts of the administrative ruling. In effect relief judicially is either too little under Section 4007 or too late under Section 4006.

This Court has at various times had to rule upon actions taken under the postal regulations. A case of similar import to the one at bar was heard and decided and styled, *Lamont v. Postmaster General*, 381 U.S. 301, wherein the issue was one involving detention of mail that was deemed to be communist political propaganda. It was found that the detention once enacted required action upon the recipient's part in order to receive such detained mail. This requirement was found to be unconstitutional and repugnant to the safeguards of the First Amendment. Mr. Justice Douglas expressing the views of seven members of the Court stated variously:

"We conclude that the Act as construed and applied is unconstitutional because it requires an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co. v. Burleson*, 255 U.S. 407, 437, 65 L. ed 704, 720, 41 S. Ct. 352 (dissenting): 'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . .'"

and Note 3 thereunder:

"3. 'Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.' *Pike v. Walker*, 73 App DC 289, 291, 121 F2d 37, 39. And see Gellhorn, *Individual Freedom and Governmental Restraints*, p. 88 et seq. (1956)."

The Court then continued stating the limitations upon Congress by virtue of the *First Amendment*:

"Here the Congress — expressly restrained by the First Amendment from 'abridging' freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan v. Esquire, Inc.* 327 U.S. 146, 90 L ed 586, 66 S. Ct. 456, any question concerning the extent to which Congress may classify the mail and fix the charges for its carriage.

...

"The regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment."

Mr. Justice Brennan with Mr. Justice Goldberg in a separate concurring opinion enunciated:

"However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.' *Martin v. City of Struthers*, 319 U.S. 141, 143, 87 L ed 1313, 1316, 63 S. Ct. 862. Since the decisions today uphold this contention, I join the Court's opinion.

"It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497,...

...

"I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

...

"But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, e.g., *Freedman v. Maryland*, 380 U.S. 51.

...

"...the statute under consideration, on the other hand, impedes delivery even to a willing addressee.

...

"If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights."

The United States District Court for the Northern District of California in the matter styled *Alan Kalker v. Lim P. Lee*, No. 51488, decided September 22, 1969, had before it a matter involving enforcement of a postal regulation, 39 C.F.R. Section 262 wherein postal authorities were permitted to detain any letter suspected of containing prohibited matter and seek authorization to open it and examine the contents if the letter was mailed from a foreign country. If such permission was not given the postal authorities could stamp the letter "unclaimed" and return it to the sender. The contention of the Petitioner in that matter was to the effect that he would concede the right of the postal authorities to open the mail and examine the contents in line with the customs power of the federal government. He disagreed, however, with the provision permitting the postal authorities to stamp the letter as unclaimed in the event permission from him was not forthcoming and thereafter to return the letter to its origin. The court held that upon this ground the postal regulation was invalid. The ruling only affected the regulation providing for the return of the letter and did not bear upon the issue of holding the letter and inspecting it. The court merely held that the portion of the regulation found as invalid was "an unreasonable and oppressive limitation on Plaintiff's right to receive such, if any, mailable, i.e., non-prohibited matter as may be contained in the letter."

This same thesis is analogous to the case presently before this Court. The attempt by the Postmaster General to conduct a departmental hearing and thereby refuse to honor money orders payable to the Appellee and to stamp all incoming mail directed to the Appellee as "unlawful" and returning the same to the sender together with the seeking of an order from a

United States District Court for the temporary detention of any and all of the Appellant's incoming mail is an unreasonable and oppressive limitation upon Appellee's right to receive such, if any, mailable matter as may be directed to him and deliverable through the postal facilities.

The fact that the proceedings were brought against Appellee has had a "chilling effect" upon the exercise of his *First Amendment* rights. An inhibition as well as a prohibition are equally denied to the government in the *First Amendment* area, *Lamont v. Postmaster General, supra*, at page 309 (Brennan, J., concurring); see also *Boyd v. U.S.*, 116 U.S. 635. It makes no difference if the action is aimed at the denial of remittances received for the distribution of the material itself. For in such a case the mail recipient is likely to restrict or end distribution of material during the pendency of such proceedings.

**F. Section 4007 as written is a denial of equal protection of the laws as applied to First Amendment freedoms.**

Another infirmity in the statutory enactment of *Section 4007* is the vice of a "denial of equal protection of the laws." Under Sub-section (b), a provision that permits and specifies certain exempt publishers and their agents, the Appellee is separated from this arbitrary classification.

"(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers."

While it is true that the *Fourteenth Amendment* to the *Constitution of the United States*, which contains a specific provision against such laws enacted by the several states, does not apply to the federal government, the government is precluded from depriving a citizen of life, liberty or property,

without due process of law under the *Fifth Amendment*. The writers of the federal Constitution saw fit to enumerate certain powers of Congress. However, many contained specific directions that the authority must be applied uniformly, i.e., "Duties, Imports and Excises," "Naturalization," "Bankruptcies", etc. When applying this principle together with reading the four corners of the Constitution it can readily be seen that when the *First Amendment* was written it was meant not only to prevent Congress from denying freedom of speech and press to all citizens but similarly Congress was precluded from denying the freedom to some of the citizens and exempting others from the prohibition. Under this exemption a publisher of materials holding a second class matter classification will not be subjected to a 4007 as Appellee has been.

Although much of the problem involving the denial of "equal protection" has arisen from state proceedings the principles are applicable here in the case at bar. This Court stated the problem of such a denial in *McLaughlin v. Florida*, 379 U.S. 184:

"When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

And in *Cox v. Louisiana*, 379 U.S. 559, this Court reversed a state court conviction and while holding the statute unconstitutional as a denial of equal protection of the laws among other reasons had this to say:

"This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be

permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor.

...  
 "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power, or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."  
 (Emphasis supplied)

The Supreme Court ruled a Maryland conviction for disorderly conduct was a denial of equal protection of the laws in *Niemotko v. Maryland*, 340 U.S. 268. The Court there had this to say of regulations of *First Amendment* freedoms:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

...  
 "No standards appear any where; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here.

...  
 "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments,

has a firmer foundation than the whims of personal opinions of a local governing body."

And in a case styled *Griffin v. Illinois*, 351 U.S. 12, the Court ordered the state to supply the defendant with a transcript as an indigent, concluding the denial of a free transcript for an indigent was not affording equal protection of the laws whereas a person with sufficient means could pay for the service. The Court reflected upon the evolution of the right and the Illinois denial thusly:

"These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court.

...

"Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

...

"Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."

See also *Burns v. Ohio*, 360 U.S. 252.

With this as a background our attention is brought to the statutes in issue. We find that the Congress has, by virtue of *Section 4007* excepted certain classes of people from its effect.

In retrospect we find that such an exemption is not afforded to all vendors utilizing the mails of magazines presumptively protected under the *First Amendment*.

The United States Supreme Court in a case styled *Morey v. Doud*, 354 U.S. 457, condemned an Illinois statute for creating unequal exemptions and stated:

"This is not a case in which the *Fourteenth Amendment* is being invoked to protect a business from the general hazards of competition. The hazards here have their root in the statutory discrimination.

...

"Taking all of these factors in conjunction — the remote relationship of the statutory classification to the Act's purpose or to business characteristics, and the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages — we hold that the application of the Act to appellees deprives them of equal protection of the law."

The Court of Appeals for the State of Maryland in a case styled *Police Commissioner of Baltimore City v. Siegel Enterprises*, 162 A 2d 727 (1960), had before it the Maryland Obscenity Statute wherein newspapers were not included within the framework of the proscribed dissemination. The Court there held the provision invalid as a denial of equal protection of the laws. The Court held:

"Freedom of the press is directly affected as to one class of publication but not as to another, and the

classification is made, not on the basis of material deemed objectionable, but the proportion of that material to other published matter. The classification, in my opinion, is unreasonable, and violates the Equal Protection Clause of the Fourteenth Amendment.

...

"The discriminations between classes of publications which are infringements of the Equal Protection Clause inhere in every provision of the statute."

The Supreme Court of California also dealt with this problem in the case of *Katzew v. County of Los Angeles*, 341 P 2d 310 wherein the Court there found that the statute applied to the publications but exempted newspapers from its proscription. The Court there stated:

"The ordinance denies distributors such as plaintiffs equal protection of the laws, since it establishes arbitrary and unreasonable exemptions.

...

"Because these exemptions are unrelated to the purported purpose of the legislation, they impose an unfair burden on plaintiffs, thus denying them equal protection of the laws. An exemption must be reasonable in order to meet the standard prescribed by *Yick Wo v. Hopkins*, ...

...

"Unlike the exemptions for accounts of crime that are true or drawn from religious writings, this latter one is not based on content, nor is it a completely different form of presenting a story. Rather, the exemption is based solely on the nature of the product produced on paper."

Likewise the State of Washington declared a state statute unconstitutional for containing arbitrary classification. In the case styled *Adams v. Hinkle*, 322 P 2d 844, the Court rejected the statute for exempting newspapers from comic book licensing requirements although the Court found various other portions deficient in the area of *First Amendment* freedoms:

"The Attorney General earnestly contends that this is a reasonable classification, and that the legislature has a right to classify if there be a rational basis for the classification. But this is not so when the equal protection clause is concerned with a right claimed under the First Amendment.

...

"When the rights claimed are among those protected from legislative invasion by the First Amendment, the equal protection clause of the Fourteenth Amendment assumes increased importance.

...

"Even if considered separately from a right guaranteed by the First Amendment, the constitutionality of such a classification is precarious at best."

The United States Supreme Court in *Yick Wo v. Hopkins*, 30 L ed. 220 at page 225 delineated much of the protection afforded citizens wherein the Court stated at page 225, reaffirming its prior decisions:

"...in the application of which there was no invidious discrimination against anyone within the prescribed limits, all persons engaged in the same business being treated alike, and subject to the same restrictions, and entitled to the same privileges, under similar conditions.

...  
 "...undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. . . Class legislation, discriminating against some and favoring others, is prohibited."

The Defendant is exposed to prosecution under *Section 4007* while the proprietor or employee of another book store may only be subjected to the provisions of *Section 4006*, simply for the dissemination of a publication. There can be no reasonable classification between Appellee and publishers entering material as second class matter. Therefore, this statute lays an unequal hand upon the Appellee in relation to other disseminators of *First Amendment publications*.

In amplification and clarification, should the holders of a second class matter permit for publications deposit the magazine, "Models de France" in the mail for delivery, then the Postal authorities would not be able to go to a United States District Court seeking a Temporary Restraining Order or a Temporary Injunction impounding that publisher's or his

agents incoming mail. Such was not the case as regards Appellee.

G. Sections 4006 and 4007 constitute an invalid prior restraint and create a chilling effect upon first amendment freedoms.

In instituting proceedings under Section 4006, the Postal authorities have invoked an unlawful "prior restraint" and created a "chilling effect" upon Appellee's protected freedom of speech and press and his constitutional right to use the mails by not first observing the constitutional mandate that an adversary judicial proceeding be held to determine the issue of obscenity *vel non*. The Section 4006 proceeding may eventually arrive at a point where all of Appellee's presumptively protected incoming mail will be stamped "Unlawful" and returned to the sender. Similarly, the Appellee would be precluded from receiving remunerations from money orders payable to him. To prevent this, the Appellee would have two alternatives: (1) completely cease using the mails either for deposit or receipt; or (2) utilize all avenues of administrative appeal and assume the burden of seeking relief in the courts. In the interim period, Appellee's constitutional right to receive mail leading to the dissemination of presumptively protected *First Amendment* publications has been "chilled" by the shadow of the Censor's heavy hand.

By like instance, in seeking an *ex parte* order under Section 4007, the postal authorities attempted to foreclose Appellee's unfettered receipt of all mail by a postal mail block. It would take a hardy individual to forward mail knowing that any and all replies would be held under a court order until each item was determined to clearly not be connected with the purportedly obscene mailings. Such an order may be issued *ex parte* since "probable cause" is all the Postmaster General must show and a postal block may be effected without first focusing on and determining the issue

of obscenity *vel non* of the challenged material. Risk of delay in the final judicial determination of the allegedly obscene mailings is inherently built-in to the procedures provided for under Sections 4006 and 4007.

This Court, in numerous cases, has repeatedly condemned invalid "prior restraints" upon the free exercise of those fundamental freedoms guaranteed under the *First Amendment*. These cases clearly support the proposition that "prior restraints" of the type sought here by the Postmaster General are constitutionally invalid for lack of proper procedural safeguards in the sensitive area of freedom of expression.

As was stated in *Near v. Minnesota*, 283 U.S. 697, with regard to the imposition of a "prior restraint" on the freedom of expression:

"... the protection even as to previous restraint is not absolutely unlimited."

But in *Batam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that:

"any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity ..."

In *Speiser v. Randall*, 357 U.S. 513 (1958), it was stated:

"the line between speech unconditionally guaranteed and speech which may legitimately be regulated ... is finally drawn. The separation of legitimate from illegitimate speech calls for ... sensitive tools ..."

The "sensitive tools" referred to in *Speiser, supra*, have been determined by this Court to mean that in the protected area of freedom of expression the administrative officials and/or law enforcement officials may impose a prior restraint or temporary suppression only if they design and comply with procedural safeguards which obviate the dangers inherent in a censorship system. The procedural safeguards must be patterned in such a manner as to assure that the burden of promptly instituting adversary judicial proceedings and the burden of showing the expression is unprotected rest upon those seeking to restrain or suppress the expression and to also assure for a prompt final judicial decision on the merits within the shortest fixed period compatible with sound judicial determination.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held the administrative procedural scheme of the Maryland Motion-picture censorship statute constituted an invalid "prior restraint" and violated the constitutional guarantee of freedom of expression because:

"First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. The Maryland scheme fails to provide

adequate safeguards against undue inhibition of protected expression, and this renders the Section 2 requirement of prior submission of films to the Board an invalid previous restraint."

The reasoning underlying the necessity for a prior adversary judicial proceeding was held to be:

"The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc. v. Sullivan*, *supra*; *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L ed 2d 809, 84 S Ct 1723; *Marcus v. Search Warrant*, *supra*; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519, 8 L ed 2d 639, 663, 664, 82 S Ct 1432."

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), this Court expressly condemned the seizure of allegedly obscene publications as an invalid "prior restraint" by stating:

"there is no doubt that an effective restraint indeed the most effective restraint possible was imposed prior to the hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the news stands and the premises of the wholesale distributor . . . the public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to out-wit the police by obtaining and selling other copies before they in turn could be seized . . . a distributor may have every reason to believe that a publication is constitutionally protected and will be so held after a judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes from him . . . mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression."

In a recent pronouncement by this Court involving *First Amendment* rights and "prior restraint," *Carroll v. President and Commissioners of Princess Anne, et al*, 21 L ed. 2d 325 (1968), Justice Fortas, expressing the views of eight (8) members of the Court, set aside an *ex parte* injunction granted by the Maryland Courts which prohibited the holding of a rally and stated the rationale as follows:

"It was issued *ex parte*, without notice to petitioners and without any effort, however informal to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

...

"Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.

"Measured against these standards, it is clear that the 10-day restraining order in the present case, issued *ex parte*, without formal or informal notice to the petitioners or any effort to advise them of the proceedings, cannot be sustained. Cf. *Marcus v. Search Warrant*, 367 U.S. 717, 731, 6 L Ed 2d 1127, 1135, 81 S Ct 1708 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L Ed 2d 809, 84 S Ct 1723 (1964). In the latter case, this Court disapproved a seizure of books under a Kansas statute on the basis of *ex parte* scrutiny by a judge. The Court held that the statute was unconstitutional. Mr. Justice Brennan, speaking for a plurality of the Court, condemned the statute for 'not first affording (the seller of the books) an *adversary hearing*' (emphasis supplied) 378 U.S. at 211, 12 L Ed 2d at 813."

...

"...there is no justification for the *ex parte* character of the proceedings in the sensitive area of First Amendment rights.

...

"In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication."

It was in the case styled, *Marcus v. Search Warrant*, *supra*, that this Court enunciated the principle that:

"... (U)nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity... without regard to the possible consequences for constitutionally protected speech."

By analogy, it appears equally clear that the Federal Government may not impose similar procedures that violate the constitutional guarantee of freedom of expression and the constitutional right to use the mail by virtue of the Due Process Clause of the *Fifth Amendment* of the *Constitution of the United States*. See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 518-519; *Lamont v. Postmaster General*, 381 U.S. 301.

While this Court, in *Manual Enterprises*, *supra*, was dealing, *inter alia*, with the issue of whether or not Congress had expressly authorized the Postmaster General, under 18 U.S.C. Section 1461, to close the mails to matter, which in

his sole discretion, fell within the prohibition of that section, it is the particular language employed by Mr. Justice Brennan, joined by former Chief Justice Warren and Mr. Justice Douglas, that appears highly relevant to the case at bar:

"I imply no doubt that Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts. However, it is enough to dispose of this case that Congress has not, in Section 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of that section. 'The provisions... would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.' *Hannegan v. Esquire, Inc.*, 327 U.S. at 156, 90 L. ed. 586, 66 S. Ct. 456."

Like Section 1461, the history of Sections 4006 and 4007 does not clearly reveal that Congress explicitly granted the authorization for the Postmaster General to determine, in his sole discretion, the obscenity of the material, impose a mail block as a result of this finding, forbid the honoring of money orders and ordering the return to the sender of the mail items.

In *Manual Enterprises, supra*, it is significant to note that it was said at pages 512-513:

"In 1950, Section 4006 was enacted granting special powers over the mail of any person found, to the

Postmaster General's satisfaction, to be using the mails to obtain money for or to be providing information about any obscene or vile article or thing: Postmasters could mark mail sent to that person 'unlawful' and return it to its sender; and they could forbid payment to that person of any money orders or postal notes, and return the funds to the senders. *The clarity of the grant of these powers is no less noteworthy than their subsequent history.* In 1956 the Postmaster General sought and obtained the power to enter an order, pending the administrative proceeding to determine whether Section 4006 should be invoked, under which all mail addressed to the respondent could be impounded. The order was to expire at the end of 20 days unless the Postmaster General sought, in a Federal District Court, an order continuing the impounding. The 20-day order by the Postmaster General, and its extension by a court, were to issue only if 'necessary to the effective enforcement of (Section 4006).' In 1959, extensive hearings were held in the House on the Post Office's request that the 20-day period be extended to 45 days, and that the standard of necessity be changed to 'public interest.' Instead, what was enacted in 1960 stripped the Postmaster General of his power to issue an interim order for any period, and directed him to seek a temporary restraining order in a Federal District Court." (emphasis supplied).

Assuming, arguendo, that the Postmaster General was expressly authorized by Congress under *Sections 4006 and 4007* to impose such restraints and secure a temporary restraining order and a preliminary injunction in Federal District Court, still there would remain grave constitutional doubts as to the validity of such a procedure which does not provide for all the fundamental safeguards that this Court has consistently stated is required in the sensitive area of freedom of expression. The imposition of the restraints in the instant case by the Postmaster General, prior to a judicially

superintended adversary proceeding, must be interpreted, in the light of this Court's rulings, to be invalid. These invalid "prior restraints" have had a "chilling effect" upon the Appellee's unfettered exercise of his freedom of expression as well as his "open right" to use of the mails, thereby inducing self-censorship.

### CONCLUSION

In summary, Appellee has, on the basis of the applicable statutes and cases cited and represented to the Court in the premises, summarized the existing law on the issues before the Court. This, together with the actions of the Postmaster General and his agents, servants, employees, attorneys and others acting under his direction and control, in seeking to suppress from the public material presumptively protected under the *First Amendment* to the *Constitution of the United States* and conjunctively to establish a mail block restricting the right of Appellee to the use of the mails in receipt and delivery of mail and postal money orders, has effectively established an unlawful "prior restraint" creating a "chilling effect" upon and a denial of Appellee's freedoms guaranteed by virtue of the *First Amendment* to the federal *Constitution*, all of which may occur without a prior judicially superintended adversary hearing.

*Sections 4006 and 4007 of Title 39* are repugnant to the provisions of the *First Amendment* in that they permit the Postmaster General and those acting under his authority and control to act as a censor by permitting an unlawful mail block and thereby denying Appellee those freedoms guaranteed by the *First Amendment* to the *Constitution of the United States*. And further, that there are no standards or guidelines to restrict the administrative officials in their action and therefore sweep within their purview presumptively

protected *First Amendment* material of Appellee's. As cited herein, *Section 4007* is further void as ancillary to *Section 4006* in that it creates an unconstitutional exemption denying Appellee the equal protection as well as application of the laws. This is all the more critical in the exercise of Appellee's *First Amendment* freedoms.

Mr. Justice Stewart stated in his concurring opinion in *Ginsberg v. New York*, 390 U.S. 629:

"The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose."

Appellee therefore requests this Court to dismiss this appeal from the United States District Court for the Northern District of Georgia or in the alternative affirm that Court's judgment.

**Respectfully submitted,**

**ROBERT EUGENE SMITH,**

**Alex. Brown & Sons Building,**

**Suite 507**

**102 W. Pennsylvania Avenue**

**Towson, Maryland 21204**

**Counsel for Appellee.**

**HUGH W. GIBERT,**

**Suite 2709**

**First National Bank Building**

**Atlanta, Georgia 30303**

**Of Counsel for Appellee.**

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